



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1286/2023

In the matter between:

PATRICIA BRIDGET MASON N O

APPELLANT

and

GRAHAM ANDREW MASON

FIRST RESPONDENT

L MASON ELECTRICAL CC

SECOND RESPONDENT

Neutral citation: *Mason N O v Mason and Another* (1286/2023) [2025] ZASCA
44 (14 April 2025)

Coram: ZONDI DP and WEINER, KEIGHTLEY and KOEN JJA and BLOEM
AJA

Heard: 4 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal

website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 14 April 2025.

Summary: Close Corporation Act 69 of 1984 – misappropriation of funds by member of close corporation (CC) – whether debt owed to CC prescribed – s 12(3) of Prescription Act 69 of 1968 – constructive knowledge of misappropriation by co-member – corporate attribution to CC – appellant failing to satisfy onus of proving constructive knowledge – unnecessary to consider issue of corporate attribution – debt not prescribed.

ORDER

On appeal from: Eastern Cape Division of the High Court, Gqeberha (Potgieter J, sitting as court of first instance):

1. The appeal is dismissed with costs, including the costs of two counsel where so employed.
2. The cross-appeal is dismissed.

JUDGMENT

Keightley JA (Zondi DP and Weiner, Koen JJA and Bloem AJA)

Introduction

[1] This appeal involves a dispute between the deceased estate (the estate) of Ashley Mason (the deceased), and his surviving brother, Graham Andrew Mason (Mr Mason), who is the first respondent. The appellant, Bridget Patricia Mason, is the wife of the deceased and the executrix (the executrix and Mrs Mason) of the estate. The second respondent is L Mason Electrical CC, a close corporation (the CC) the sole members of whom, during the deceased's lifetime, were the deceased and Mr Mason.

[2] The deceased held a 60% interest in the CC and Mr Mason the remaining 40%. The brothers had different responsibilities in the business of the CC. The deceased oversaw the management and finances. He was assisted in its

administration by his wife and his daughter. Mr Mason, on the other hand, had no involvement in the management and financial aspects of the business, instead playing a hands-on role in its operational and technical side.

[3] On 5 May 1999, the Mason brothers entered into an agreement, the purpose of which was to provide that, on the death of one member, the surviving member would purchase, from the deceased member's estate, his interest in the CC. To facilitate this, each member agreed to take out a life insurance policy (the policy), in his name, on the life of the other member. The agreement provided that the price payable by the survivor for the deceased member's interest in the CC would be the proceeds of the policy, less estate duty. Central to the dispute was clause 6.2. It provided:

'If the Deceased shall have been indebted to the [CC] at the date of his death on any cause of debt whatsoever, the Survivor shall be entitled to withhold from any payment due to the Executor in terms hereof and to pay to the [CC] an amount equal to the said Indebtedness, and any such payment shall be deemed to be a payment to the Executor on account of the purchase price.'

[4] The deceased died on 25 April 2016. As at that date the value of the policy on his life was R4 779 372. This amount was paid to Mr Mason by the insurer. The executrix sought to enforce the terms of the agreement by tendering the deceased's interest in the CC to Mr Mason against payment to the estate of this amount. When Mr Mason resisted the demand for payment, she issued summons against him under case number 2353/2016 (the executrix's claim) in the Eastern Cape Division of the High Court, Gqeberha (the high court).

[5] In his plea, Mr Mason placed reliance on clause 6.2 of the agreement. He pleaded that during his lifetime, and while managing and controlling the CC, the

deceased had misappropriated funds from the CC for his and his family's benefit. Mr Mason pleaded further that while the exact amount misappropriated by the deceased was not presently quantifiable, it exceeded the value of the proceeds of the policy. He averred that the deceased was indebted to the CC in an amount exceeding R4 779 372 and, therefore, that under clause 6.2 he (Mr Mason) had no obligation under the agreement to effect payment to the estate of the amount claimed.

[6] The executrix applied for summary judgment, which was opposed by Mr Mason. He filed an opposing affidavit (the summary judgment affidavit) in which he set out his defence to the action. Of relevance to the appeal, he made the following averments:

‘9.1 Over a period of 15 years, the deceased, my late brother, acquired significant assets.

9.2 I did not understand the means by which these assets were acquired. Besides the fact that I am a lay person, being in business with my brother, I trusted him.

9.3 Upon the passing away of my brother, I was in a position for the first time to obtain certain records of the [CC] that hitherto had not been made available to me.

9.4 It immediately became apparent that the deceased had made large scale withdrawals from the [CC], either in his personal capacity, or diverted monies to his family.

10.1 My preliminary investigation revealed not hundreds of thousands, but millions of rands were diverted from the [CC] to fund the acquisition of properties, a wine and olive farm in the Calitzdorp area, which included the building of a winery (a massive expense).

10.2 Subsequent thereto I have engaged the services of forensic auditors, Derek Pearton Financial Services, who are currently busy finalizing their forensic report. The preliminary investigations reveal that the misappropriation/unlawful withdrawals are well in excess of R5 million.’

[7] The matter did not proceed by way of summary judgment. In the interim, the CC was joined as a party to the action. Mr Mason and the CC instituted a separate

action in the high court, under case number 3039/2016, against the estate (the CC's claim). This action was based on the alleged misappropriation committed by the deceased. The relief sought was for a statement and debatement of account. In the particulars of claim, it was averred that the alleged misappropriation of funds had occurred in the period between 2001 to 25 April 2016.

[8] The executrix raised a special plea of prescription to the CC's claim. She pleaded that:

- '2. Throughout [the period between 2001 to 25 April 2016] [Mr Mason] held a 40% member's interest in the CC and he accordingly owed to the CC a fiduciary duty as required by law.
- 3. In the event only that it is found that [the deceased] conducted himself unlawfully in the manner alleged by the plaintiffs, which is in any event denied:
 - 3.1 Then [Mr Mason] knew, or ought reasonably to have known by virtue of the fiduciary duty he owed to the CC, of such unlawful conduct.
 - 3.2 [Mr Mason's] knowledge is in the circumstances imputed to the corporation.
 - 3.3 The plaintiff's summons was served on the defendant on 5 September 2016.
 - 3.4 The plaintiffs' claims against the defendant have accordingly become prescribed by operation of section 11 of the Prescription Act, 68 of 1969, save in respect of any unlawful conduct which may be proved during the three year period immediately preceding the service of summons on the defendant, which unlawful conduct is in any event denied'

[9] The two actions were consolidated for trial in the high court. By the time the matter was ripe for hearing, the issues between the parties had narrowed. Significantly, it was no longer seriously disputed by the executrix that the deceased had misappropriated funds from the CC between 2001 and 25 April 2016. Nor was it disputed that at least some of the amounts were repayable by the estate. The primary issue in dispute was that of prescription.

[10] The executrix accepted that all amounts unlawfully misappropriated by the deceased in the three years preceding his death were owed to the CC. It was agreed that this amounted to approximately R644 142.58. However, she contended that the debt, being the balance of the amounts misappropriated, had become prescribed vis-à-vis the CC. This was because Mr Mason's knowledge of the deceased's misappropriation, as pleaded in paragraph 3.1 of her plea, was attributable to, and hence became the knowledge of, the CC. Consequently, she sought an order that Mr Mason be directed to pay to the estate the proceeds of the policy, less the amount of R644 142.58 being the amount of the deceased's indebtedness to the CC that had not prescribed.

[11] The trial proceeded with the evidence of only one witness, Mr Pearton, who was Mr Mason and the CC's forensic auditor. He had compiled an expert report (the Pearton report) on the investigation that he had conducted into the financial affairs of the CC and the related misappropriation of funds by the deceased. Mr Mason did not give evidence, nor did the executrix or her expert, who had prepared a report and held expert discussions with Mr Pearton. At the end of the trial, the high court dismissed the executrix's claim. The court directed the executrix to pay to the CC the amount of R7 406 139. 97 (being the total amount of the misappropriation by the deceased established on the evidence) to the CC. From this amount was to be deducted the amount paid to Mr Mason under the policy. Mr Mason was ordered separately to pay the amount of the policy to the CC. The executrix was ordered to pay the costs of the consolidated action in her representative capacity.

[12] The high court granted the executrix leave to appeal against its judgment and order and directed that the appeal be heard by this Court. The CC was granted leave to cross-appeal against the costs order.

[13] The issues on appeal are limited. The first is whether the high court erred in rejecting the executrix's plea of prescription (the prescription issue). Stated differently, the question is whether, contrary to what the high court found, the executrix succeeded in establishing that Mr Mason had actual or constructive knowledge of the misappropriation by the deceased during the latter's lifetime. It is only if this question is answered in favour of the executrix that the second issue will require consideration. That is the question of whether Mr Mason's knowledge of the misappropriation can be attributed to the CC (the corporate attribution issue). Finally, the cross-appeal against the costs order must be considered.

[14] The legal principles that apply to the prescription issue are trite. Under s 12(1) of the Prescription Act 68 of 1969 (the Act), prescription commences to run as soon as a debt is due. This is subject to two riders in s 12(3). First, the section creates the exception that a debt will not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises. The second is the proviso to this exception, namely that 'a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care'. The onus lies on the party raising the special plea of prescription to prove the defence, including the facts on which the exception in s 12(3) is based.¹

¹ *Gericke v Sack* 1978 (1) SA 821 (A) (*Gericke*) at 826C-827G. See also *Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme* [2017] ZASCA 116; [2017] 4 All SA 705 (SCA); 2018 (1) SA 513 (SCA) para 61.

[15] It is settled that prescription will commence when the creditor has the minimum facts necessary to institute action.² Prescription will not be delayed because she or he does not yet have the evidence to prove the case comfortably.³ As far as the knowledge contemplated in s 12(3) is concerned, this may be either actual knowledge, or constructive knowledge under that section's deeming proviso.⁴ A creditor whose passivity, or supine inaction, accounts for their lack of actual knowledge may nonetheless be held to have had the requisite constructive knowledge under the proviso if, by acting diligently, they reasonably could have acquired the facts necessary to institute action.⁵

[16] The executrix initially pleaded actual knowledge, alternatively, deemed or constructive knowledge on the part of Mr Mason. However, by the time the appeal was heard, she placed reliance only on Mr Mason's alleged constructive knowledge of the misappropriation effected by the deceased. Her case was that the facts demonstrated that Mr Mason's position in the CC was such that with the exercise of reasonable care he could have acquired knowledge of the misappropriation committed by the deceased sufficient to support the CC's claim.

[17] The case on appeal rested on two legs. The first was the contention that as a member with a 40% interest, Mr Mason owed a fiduciary duty to the CC under the Close Corporations Act 69 of 1984. He was obliged to exercise such powers as he

² *Minister of Finance v Gore NO* [2006] ZASCA 98; [2007] 1 All SA 309 (SCA); 2007 (1) SA 111 (SCA) at 119J-120A (*Gore*).

³ *Nedcor Bank Bpk v Regering van die Republiek van Suid-Afrika* 2001 (1) SA 987 (SCA) paras 11 and 13 (*Nedcor*).

⁴ *Le Roux v Johannes G Coetzee en Seuns* [2023] ZACC 46; 2024 (4) BCLR 522 (CC); 2024 (4) SA 1 (CC) para 40.

⁵ *Gericke* fn 1 at 832B-D; *Macleod v Kweyiya* [2013] ZASCA 28; 2013 (6) SA 1 (SCA) (*Macleod*) at 6C-E.

had to manage or represent the CC in the interest, and for the benefit of, the close corporation.⁶ He had an entitlement to participate in the carrying on of the business of the CC,⁷ and to call a meeting of members for any purpose.⁸

[18] According to the executrix, as a matter of law, Mr Mason had a legal duty to use these powers for the protection of the CC. He could have convened a member's meeting with a view to extracting from the deceased full disclosure of the CC's affairs. He could have asked for access to the financial statements of the CC. Had he done so, the deceased would have been bound, by his own fiduciary duty to the CC, to make full disclosure, putting Mr Mason in a position to approach the court for appropriate relief to protect the CC. In short, what the executrix argued was that through the exercise of his legal obligations and entitlements as a member of the CC he could reasonably have acquired knowledge of the deceased's misappropriation of funds.

[19] I am not persuaded that the fact that Mr Mason stood in a fiduciary relationship to the CC, and that he had certain statutory obligations and entitlements available to him, is sufficient to satisfy the burden resting on the executrix. In the absence of facts to support this thesis, the argument is speculative. Taken to its logical limits, it would mean that every member of a CC, by virtue of his or her legal relationship with the corporation, as a matter of course, would have constructive knowledge of wrongdoings in its management for purposes of prescription. As this case demonstrates, such an outcome could operate to the detriment of the CC.

⁶ Section 42(2)(a)(i).

⁷ Section 46(a).

⁸ Section 48(1).

Plainly, in every case, facts must be pleaded and proved to show that it would have been reasonably expected of a member, like Mr Mason in this case,⁹ to exercise his powers. In addition, there must be evidence that had he or she done so, the facts necessary to support the claim against the wrongdoer would have come to light.

[20] The second leg of the executrix's case was that there was evidence to this effect. There were, according to her, two 'red flags' that, had Mr Mason acted reasonably, would have alerted him to wrongdoings in the CC. Instead, it was contended, he had adopted a supine attitude by ignoring them and, accordingly, he could not claim the benefit of the exception in s 12(3) to delay the running of prescription.

[21] The first red flag relied on by the executrix appeared from statements made in the summary judgment affidavit. The executrix placed reliance particularly on Mr Mason's statements that he and the deceased drew only modest drawings from the CC; that over 15 years the deceased had acquired 'significant assets'; that Mr Mason did not understand how he had acquired them; that when the deceased died it had 'immediately become apparent' to Mr Mason that the deceased had made large-scale withdrawals from the CC; and that Mr Mason's 'preliminary investigation' had revealed the diversion of substantial sums, amounting to millions of rands, to fund assets for the deceased. The submission by the executrix was that, on Mr Mason's own version in the summary judgment affidavit, there were warning signs that something was amiss with the financial affairs of the CC, and that the reasonable

⁹ *Macloed* fn 5 at 6C-E.

member in his position would have used the statutory powers available to him to find out what was afoot. Had he done so, it was submitted, he could have found out what was going on.

[22] There are several difficulties with the executrix's reliance on the summary judgment affidavit. It is a brief affidavit setting out no more than an outline of Mr Mason's intended defence to the executrix's claim against him. Importantly, it was not an answer to the executrix's special plea of prescription, which came later. By its nature, the summary judgment affidavit was intended to do no more than demonstrate that he had a bona fide defence. It was not meant to set out chapter and verse of the particulars of the defence. Nor did it. In fact, the portions of the affidavit emphasised by the executrix are no more than one-line statements, abstracted from any explanatory context. They cannot be interpreted to say, as the executrix sought to persuade this Court, that Mr Mason was, or ought to have been, suspicious of how his brother had acquired significant assets, or that the misappropriation of funds would have been obvious to him, had he had access to the CC's records earlier. That would be to assume a context, and hence nuance, that is not present in the summary judgment affidavit.

[23] The second red flag was that, according to the Pearton report, and confirmed by Mr Pearton in his evidence, Mr Mason had approached the bookkeeper more than once to find out why his loan account was always in the red, while the deceased's was in credit. The executrix submitted that this demonstrated that Mr Mason's suspicions were raised, or that they ought reasonably to have been. In either event, it was submitted by the executrix that he ought then to have taken steps to find out what was going on with the CC's financial affairs.

[24] As I indicated earlier, the facts were that the deceased managed the CC and was in control of its financial affairs. Mr Pearton testified that Mr Mason's role was on the technical side, in the workshop or at sites where the contract work was performed. His only involvement on the business-side was to occasionally sign cheques if the deceased was not available and to sign financial statements. This had been confirmed by the bookkeeper, whom Mr Pearton had interviewed. The bookkeeper made entries on the Pastel accounting system on the instructions of the deceased, or the executrix and their daughter, who worked in the office. None of this was challenged by the executrix. On the facts, it must be accepted that the operation of the CC's business depended on the deceased and Mr Mason fulfilling these separate and distinct roles.

[25] The CC was a family business that was started by the brothers' father. There is no evidence of any bad blood between the brothers during the deceased's lifetime that would have led Mr Mason to distrust the deceased and his management of the CC and its finances. The CC by all accounts functioned well until after the deceased's death, when the misappropriations came to light. According to Mr Pearton, it had a very good turnover earned from the large contracts it secured. Mr Pearton explained there was enough cash coming in to ensure that the business was not affected by the deceased's misappropriation of funds. Again, this evidence went unchallenged.

[26] Red flags are easy to spot in hindsight, but hindsight is not the appropriate vantage point here. The question is whether, on failing to receive a satisfactory

response to queries about her or his loan account being in the red, the reasonable person would have suspected that the deceased might be misappropriating funds from the CC. The question must be considered from the position of a reasonable person in the shoes of Mr Mason at the relevant time. The facts do not lead to this conclusion. The business was in a healthy financial state. It was not unusual that personal expenses were paid by the CC and then debited to the relevant member's loan account. While Mr Mason may have been concerned about the accuracy of the status of his own loan account, he had no reason to distrust his brother's financial management, let alone suspect him of stealing from the CC.

[27] Counsel for the executrix made much of what he submitted were important concessions made by Mr Pearton under cross-examination. He contended that these concessions proved that the misappropriation of funds would have been obvious to Mr Mason had he looked for them. In other words, the argument was that Mr Pearton's concessions showed that with the exercise of reasonable care Mr Mason would have been able to acquire the knowledge necessary to take steps to protect the interests of the CC at the time that the misappropriations occurred.

[28] The fundamental flaw with this argument is that it is divorced from the realities of the case established on the evidence. Mr Pearton's evidence and report explained in detail how the various forms of misappropriation were captured and dealt with in the financial records over the entire period of 17 years. It is plain from this evidence that to understand what was going on, Mr Mason would have had to have access to much more than the financial statements of the CC which, conceivably, he could have acquired using his statutory rights.

[29] He would have required to access the manual cash books until 2009, when the CC went over to the Pastel accounting system. It is not only the CC's cash books that he would have had to access, but also those its second line of business, under the name of Data Cabling, in which, according to Mr Pearton, most of the misappropriations appeared. The cash books alone would not have been enough, because the entries were mostly abbreviated and without sufficient detail to indicate, without more, who the creditor was, and what the payment had been for. It had been necessary for Mr Pearton to source and peruse supporting documents, emails and invoices to discover these details. Some entries were made with misleading explanations. For example, amounts paid for 'stationery' were payments for labels for the wine that the deceased was producing on his farm. Mr Pearton had to delve deep to find this information. Mr Mason could not have obtained this level of information simply through the exercise of his statutory rights.

[30] Even if this was theoretically possible (which in any event, in my view is insufficient to satisfy the onus on the executrix), the argument based on Mr Pearton's concessions is flawed for two further, related reasons. The first is that the concessions from Mr Pearton were extracted based on an explicit assumption that was put to him: he was asked to answer the questions on the assumption that Mr Mason had taken 'his duties more seriously and involved himself in the financial affairs' of the CC. Any concession based on such an explicit assumption has no probative value unless the assumption is grounded in fact.

[31] This leads to the second flaw, which is that the evidence dispels the assumption. The uncontested evidence was that Mr Mason was excluded from any financial role in the business. He was not required to involve himself in its financial

affairs at all. In the circumstances, it could not convincingly be contended that he failed to take reasonable steps to discover the misappropriations because he did not involve himself more seriously in the financial side of the business. That would involve measuring him against the standard of a reasonable person who was not in his position.

[32] At the end of the day, the executrix bore the onus of establishing that with the exercise of reasonable care Mr Mason could have uncovered the necessary facts about the misappropriation of funds by the deceased that would have enabled Mr Mason timeously to take steps to protect the CC's position. On the evidence, she failed to satisfy this onus. The high court did not err in coming to the same conclusion. It follows that the appeal in respect of the dismissal of the special plea of prescription must fail. In the circumstances, it is not necessary to consider the appeal insofar as the corporate attribution issue is concerned.

[33] The remaining issue is the cross-appeal against the costs order. The high court made the customary order of costs in estate matters by directing that they be borne by the executrix in her representative capacity. In support of the cross-appeal Mr Mason raised various criticisms about how the executrix's case had been managed. He also submitted that the evidence indicated that Mrs Mason, in her personal capacity, was aware of the deceased's wrongdoing and was complicit in it. He submitted that the high court had committed an appealable misdirection by not taking these factors into account.

[34] It is trite that an appeal court can only interfere with an order of costs in very limited circumstances. Criticisms levelled at how a party managed its case do not

warrant interference. As to the alleged personal complicity of the executrix, it is important to draw a distinction between Mrs Mason in her personal capacity, and Mrs Mason in her capacity as executrix. In her latter capacity, she had an obligation to act in the interests of the estate and of the ultimate beneficiaries. She did no more than this in pursuing her claim against Mr Mason for payment of the proceeds of the policy under the agreement. Accordingly, there was no misdirection on the part of the high court in declining to direct that she be personally liable for the costs. There is no merit in the cross-appeal. As it comprised so minor a component of the overall costs, the pragmatic approach is to make no order as to the costs of the cross-appeal.

[35] For all the above reasons, I make the following order:

1. The appeal is dismissed with costs, including the costs of two counsel where so employed.
2. The cross-appeal is dismissed.

R M KEIGHTLEY
JUDGE OF APPEAL

Appearances

For the appellant: S C Rorke SC

Instructed by: Rushmere Noach Incorporated, Gqeberha

McIntyre Van der Post Inc., Bloemfontein

For the respondent:

P E Jooste with K M Morris

Instructed by:

Friedman Scheckter, Gqeberha

Honey Attorneys, Bloemfontein.